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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

18 Cr. 16 (RJS)

5 AKAYED ULLAH,

6 Defendant.

7 -----x

8 August 30, 2018
9 2:50 p.m.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
17 Southern District of New York

18 BY: SHAWN G. CROWLEY

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19 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant Ullah

20 BY: AMY GALLICCHIO

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(Case called)

THE COURT: Appearances for the government.

MR. TURNER: Good afternoon, your Honor. George Turner, Shawn Crowley, and Rebekah Donaleski for the government.

THE COURT: Good afternoon to each of you.

And for the defendant?

MS. GALLICCHIO: Good afternoon, your Honor. Federal Defenders by Amy Gallicchio for Mr. Ullah.

THE COURT: Yes. Okay. Ms. Gallicchio, Mr. Ullah.

THE DEFENDANT: How are you.

THE COURT: Good afternoon to you.

I apologize for making you all wait. I had a witness on the stand who was being cross-examined, and you had to stop and come back with a witness who is in the middle of cross. So we wrapped it up, but I'm sorry to make you wait, you have other things to do, I know.

So, we are here in connection with the defendant's motion to dismiss Count Six of the indictment, and so I have the parties' briefs, I have reviewed the cases, and I think what I would be inclined to do is have oral argument with Ms. Gallicchio going first, it is her motion.

How is the sound? I feel like it is very reverby.

MS. GALLICCHIO: It is fine.

THE COURT: It is not too bad? Okay.

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1 So, I will have Ms. Gallicchio go first and then have
2 the government respond. Who is going to be carrying the ball
3 for the government?

4 MR. TURNER: I will, your Honor.

5 THE COURT: Since it is your motion, Ms. Gallicchio, I
6 will give you opportunity to respond to that. I will probably
7 have questions throughout. And then we will see where we are.
8 Okay?

9 MS. GALLICCHIO: Okay.

10 THE COURT: You can do it there or at the lectern,
11 whatever you prefer. Just try to keep near the microphone,
12 okay?

13 MS. GALLICCHIO: Maybe I will go to the microphone, it
14 might be easier.

15 THE COURT: Sometimes it is if you have papers.

16 Go ahead.

17 MS. GALLICCHIO: Thank you, your Honor.

18 So, your Honor, in our papers we move to dismiss Count
19 Six of the indictment pursuant to Rule 12 of the Federal Rules
20 of Criminal Procedure.

21 THE COURT: And that's the count that has a 30-year
22 mandatory consecutive, if there were a conviction?

23 MS. GALLICCHIO: That's correct, your Honor.

24 And we move pursuant to Rule 12 for failing to state
25 an offense. Count Six, of course, does charge 924(c). An

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1 element of a crime, of course, must be charged in the
2 indictment. 924(c) criminalizes the use of a deadly weapon
3 during, and in relation to, or in furtherance, of a crime of
4 violence.

5 It is our position is that it is a combination crime.
6 The crime of violence must be a separate crime of violence.
7 Count Six is predicated on Counts One through Five which, it is
8 our position, are not separate and distinct crimes of violence
9 and, therefore, Count Six fails to state an offense and should
10 be dismissed.

11 We also raise, in our papers, your Honor --

12 THE COURT: You think that Count One wouldn't count?
13 Wouldn't make a combination? Or is your argument with Count
14 One different?

15 MS. GALLICCHIO: Our argument with respect to Count
16 One is different. Count Six is predicated on One through Five,
17 but our argument with respect to Count One is different.

18 THE COURT: That's what I thought.

19 MS. GALLICCHIO: And I will raise that later, as I
20 will with respect to, as we stated in our papers, Counts One
21 Two and Four, I believe, which it is our position that under
22 the current state of the law, particularly in light of or
23 actually in light of *Sessions v. Dimaya*, are no longer crimes
24 of violence under the elements clause of 924(c), but I will
25 address that second.

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1 THE COURT: Okay.

2 MS. GALLICCHIO: So, your Honor, with respect to
3 924(c), as we have stated in our papers, it is our position
4 that 924(c) requires a separate and distinct crime of violence
5 separate from the use of, as the statute says, a firearm, which
6 of course is also, can also be an explosive device or a bomb.

7 So, any person, according to 924(c) who, during and in
8 relation to a crime of violence, uses or carries a firearm, or
9 in furtherance of any such crime, possesses a firearm. The
10 Supreme Court has clearly held that 924(c) has two distinct
11 conduct elements and those cases which clearly outline that
12 principle are the two United States Supreme Court cases *United*
13 *States v. Rodriguez Moreno* from 1999 and *Rosemond v. United*
14 *States* from 2014.

15 In *Rodriguez v. Moreno*, which address the underlying
16 crime of kidnapping in relation to 924(c), the Court held that
17 we interpret 924(c) to contain two distinct conduct elements.
18 It criminalizes a defendant's use of a firearm during and in
19 relation to a crime of violence and in *Rosemond*, equally, the
20 Court, in 2014, made it very clear that 924(c) is a combination
21 of statutes consisting of two separate actions -- an underlying
22 crime of violence and a distinct use of a firearm in
23 furtherance of that crime. It is not using a bomb while using
24 a bomb. It is not possessing a gun while possessing a gun. In
25 fact, Justice Kagan, in the decision, made clear that 924(c)

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1 does not cover something like simply firing a gun in the park.
2 Because it is a combination crime it punishes, as the Court
3 said, the temporal and relational conjunction of two separate
4 acts on the ground that they, together, pose an extreme risk of
5 harm.

6 So, 924(c) was written to be an aggravated punishment,
7 right, for a crime that's made worse by the use of a firearm.
8 The substantive crimes here, Counts Two through Five, require
9 the use of a bomb and can't be committed without a bomb. They
10 require the use of a bomb and can't be made worse by the use of
11 a bomb. 924(c) was not written to cover what is essentially a
12 bombing alone.

13 The government's position essentially weeds out the
14 language of during and in relation to a crime of violence in
15 their position that the two separate acts required by the
16 Supreme Court does not exist.

17 THE COURT: Why is that true with respect to Count
18 Five? Terrorist attack against mass transportation systems,
19 which that one basically it is not limited to bombs, it is a
20 range of activities that include, in some cases, just using a
21 dangerous weapon which might even be a knife or a hammer.

22 Right?

23 MS. GALLICCHIO: Well, I think that with respect to --
24 Mr. Ullah has been charged under several subsections of that
25 offense, right, so I think in all of those subsections it is

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1 required that either a destructive device is an element of that
2 offense, is the conduct, is the actual conduct that encompasses
3 that offense. And so, it is our position that Count Five also,
4 with respect to 924(c), is not a separate and distinct crime of
5 violence.

6 Your Honor, the government has not pointed to any --

7 THE COURT: Well, (7). 1992(a)(7) makes it a crime
8 when a person commits an act including the use of a dangerous
9 weapon with the intent to cause death or serious bodily injury.
10 So.

11 MS. GALLICCHIO: Right. Well, here, the conduct
12 alleged in this case is the use of a bomb. Right?

13 THE COURT: There is a categorical approach to all of
14 this, right? So --

15 MS. GALLICCHIO: Well, no.

16 THE COURT: You said -- let me interrupt you. Sorry.

17 You are likening this to a crime of using of a bomb
18 and getting an enhancement that involves using a bomb while
19 using a bomb.

20 MS. GALLICCHIO: Right.

21 THE COURT: But I do think that Count Five can be
22 distinguished, certainly from the others in this indictment and
23 from the example you have used, or Justice Kagan used, because
24 Section 7 doesn't talk about using a bomb. It talks about
25 using a dangerous weapon.

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MS. GALLICCHIO: Right.

Well, I am not talking about here, your Honor, a categorical approach. That would be if we were analyzing this offense as whether it is actually a crime of violence. We are talking about Count Five here, we are analyzing is it separate and distinct, whether it is crime of violence or not, separate and distinct from the use of a weapon, right? Which is what 924(c) requires. And the conduct element with respect to Section 7 of 1992 is the use of a weapon and therefore that is a conduct element and is not separate and distinct from what 924(c) prescribes.

Your Honor, I think 924(c), the government's interpretation is not supported. The government's interpretation that these two acts' requirement do not exist is not supported by any case law or in the Second Circuit. 924(c) was written for crimes aggravated by the use of a firearm, not for crimes that were completed by the use of a firearm.

As the Supreme Court held in, it was in 1998 in *Muscarello v. United States*, 924(c) was written, generally, to persuade a man who has attempted to commit a federal felony to leave his gun at home. These crimes cannot be committed by leaving a bomb at home.

Your Honor, I think also our position is supported by, as we have stated in our papers, several canons of construction which I will just address briefly here. In particular, the

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1 Court must give effect to all the words of the statute and the
2 government's construction reads out the words during and in
3 relation to a crime of violence and I think that their position
4 is ignoring the controlling case law on that issue.

5 Additionally, your Honor, if there is a tension
6 between a general statute, which 924(c) is, and specific ones,
7 which Counts Two through Five are, the specifics ones should
8 control. Congress has clearly -- has clearly -- set out
9 various statutes that cover the actions that are simply
10 alleging that a bomb was used as Counts Two through Five do.
11 Congress has set out specific penalty provisions, many of which
12 allow for a sentence up to life and some include a mandatory
13 minimum. So, the penalty provisions for these charges are very
14 severe. While one of them, I believe, does call for mandatory
15 minimum, certainly not near 30 years, however there is the
16 possibility of life in prison for these offenses regardless of
17 any mandatory minimum.

18 If Congress, it is our position, had wanted to import
19 924(c), the mandatory minimum into the punishment schemes for
20 the bombing offenses, they would have. 924(c), your Honor,
21 these crimes were all enacted after 924(c) was amended to
22 include the 30 year mandatory minimum.

23 924(c) was not written for this situation and I think
24 it is important, if we look at some of the language in 924(c)
25 also, it is very informative. In particular, when the

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1 amendment took place, the language that says any person who,
2 during or in relation to a crime of violence or a drug
3 trafficking crime, including a crime of violence or drug
4 trafficking crime that provides for an enhanced punishment if
5 committed by the use of a deadly weapon or dangerous device.
6 So, I think that's actually very informative because it makes
7 very clear that we are talking about an underlying offense that
8 additional penalties could be imposed even if the underlying
9 offense is committed while using a firearm and that's just
10 simply not the case here. The crimes here, the underlying
11 crimes here, the alleged predicate offenses of Two through
12 Five, they don't carry an enhanced punishment for using a
13 weapon or a dangerous instrument or bomb because they require
14 the use of it.

15 THE COURT: They don't require the use of a bomb,
16 right?

17 MS. GALLICCHIO: Well, yes, they do.

18 THE COURT: Well, again, let's go to Count Five, which
19 is 18 U.S.C. 1992(b).

20 MS. GALLICCHIO: Sorry. Which subsection, your Honor?

21 THE COURT: (b). (b)(1), which makes it a crime to
22 engage in a terrorist attack against a mass transportation
23 system by placing or attempting to place a destructive
24 substance and destructive device in, upon, and near a variety
25 of different facilities.

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1 MS. GALLICCHIO: Did you say 1992(b)(1)?

2 THE COURT: I think it is (b)(1). I am reading from
3 the indictment now.

4 MS. GALLICCHIO: I think (b)(1) is an aggravated
5 offense.

6 THE COURT: My point is you are saying there is
7 duplicity here. You are saying using a gun --

8 MS. GALLICCHIO: We are not talking about duplicity,
9 your Honor. We are talking about -- that's not our argument
10 and that is sort of what the government has tried to couch our
11 argument in, in one of duplicity and one of double jeopardy.
12 That's not our argument here. We are alleging a defect in the
13 indictment, a failure to plead an element of the 924(c) count
14 which is an underlying crime of violence, other than the use of
15 a bomb.

16 So, I will turn to double jeopardy because that is
17 what the government's opposition focuses on and the cases that
18 they cite *Mohammed*, *Salameh*, and *Khalil*, all address the
19 question of all with respect to the issue of multiple
20 punishments. Right? And the implications that it has for
21 double jeopardy.

22 Your Honor, that is not the issue that we are raising
23 here and those cases did not address the question that's raised
24 here by Mr. Ullah and they cannot be said to have decided it as
25 a result. The issue was never raised.

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1 In *United States v. Mohammed*, your Honor, that case
2 involved a car jacking as a predicate offense to 924(c), that
3 was a Second Circuit case in 1994. That certainly has a
4 separate offense conduct, a car jacking. It did involve a
5 situation in which, I'm sorry, 2119, which was the car jacking
6 statute at the time, did have a firearms element to it. It no
7 longer does. But, it is a separate and distinct crime of
8 violence. So, *Mohammed* really has no application here.

9 *United States v. Salameh*, your Honor, did charge an
10 underlying offense of 844(i), in fact actually 844(i)
11 conspiracy and an assault, I believe, on a federal Secret
12 Service agent as underlying predicate crimes of violence.

13 Count Four also charges 844(i) but, in *Salameh*, the
14 charge there was a conspiracy to commit 844(i), your Honor, and
15 conspiracy is quite different. Conspiracy does have other
16 conduct elements that is not simply using a destructive device
17 and it is separate and distinct from the use of a bomb. And in
18 that case the Court held, in *Salameh*, that the imposition of a
19 separate 924(c) sentence is not defeated by the fact that
20 violent crimes underlying the 924(c) conviction themselves
21 provide for enhancement penalties.

22 That's the ruling in that case. Right? That's not
23 the conversation, that's not our position, that's not our
24 question here.

25 And also in *Khalil*, your Honor, that also, that

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1 involved 924(c) with a 2332(a) conspiracy charge, which is the
2 same thing that is charged -- well, what is charged in Count
3 Two, not a conspiracy, the actual substantive offense. So,
4 again, I think we are talking about different conduct element
5 when we are talking about a conspiracy. And, in *Khalil*, the
6 Court said that there is no doubt that 924(c) describes a
7 firearms offense that is distinct from the underlying crime of
8 violence in connection with which the firearm was carried or
9 used. And I think what is also important about these cases, in
10 particular *Salameh* and *Khalil*, is that they address underlying
11 predicate offenses which our position is, now, are no longer
12 crimes of violence.

13 And so, your Honor, we are alleging -- we are not
14 alleging a violation of double jeopardy or alleging duplicity.
15 We are alleging a defect in the indictment, a failure to plead
16 an offense, plead an element of 924(c). Our argument is that
17 the 924(c) count is missing the element of a separate and
18 distinct underlying crime of violence.

19 This issue has, was litigated last year before Judge
20 Berman in the case of *United States v. Rahimi*, this very
21 motion, this very issue with respect to 924(c), and in denying
22 the motion Judge Berman stated that the criminal charges which
23 have been sustained in cases analogous to *Rahimi* compel this
24 result. The cases that the Court points out are far from
25 analogous.

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1 I have already addressed, essentially the Court listed
2 and cited to five cases, *Khalil* and *Salameh* were two of them,
3 which I have already addressed. The other three were *U.S. v.*
4 *Dye*, which is a Sixth Circuit case, *United States v. Garcia*,
5 which is an Eastern District decision -- sorry District Court
6 decision in the Eastern District of California.

7 THE COURT: It was affirmed in the Ninth Circuit.

8 MS. GALLICCHIO: I'm sorry.

9 THE COURT: And was affirmed in the Ninth Circuit.

10 MS. GALLICCHIO: Yes.

11 THE COURT: And *United States v. Smith*, which is a
12 Second Circuit case. Your Honor, those cases all involve
13 questions of multiplicity and double jeopardy arguments.
14 Again, that is not the argument we are making here, your Honor,
15 and in particular *United States v. Garcia* honestly doesn't
16 really even address the issue. That's a question about the
17 844(i) count itself and there was a claim that that count
18 itself, because it charged two separate bombings, was
19 duplicitous in and of itself, and the Court found in that case
20 that it was a conjunctive pleading style which they approved
21 of.

22 So that case itself doesn't really even come close to
23 being analogous. And again, your Honor, all of those cases,
24 those three cases, aside from *Khalil* and *Rahimi*, relate to the
25 underlying predicate offense of 844(i), which I will discuss in

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1 a moment, it is our position is no longer a crime of violence
2 and in fact the Tenth Circuit has said so in *United States v.*
3 *Salas*. So, your Honor, we don't think that the decision in
4 *Rahimi* gives any guidance to the Court and the cases are simply
5 not analogous to the case here.

6 So, I'm going to turn now to the question of the crime
7 of violence, if I may, your Honor.

8 THE COURT: Residual cause.

9 MS. GALLICCHIO: Yes. Exactly.

10 So, we have pointed out that it is our position that
11 certainly Count One, charging provisional material support to a
12 foreign terrorist organization, Count Two, use of a weapon of
13 mass destruction, and Count Four, destruction of property, are
14 no longer crimes of violence in light of *Sessions v. Dimaya*.

15 Your Honor, I am sure you are very familiar with
16 *Sessions v. Dimaya*, declares, of course, 18 U.S.C., 16(b)
17 impermissibly vague in violation of the Due Process Clause of
18 the Fifth Amendment. It is our position that that invalidates,
19 effectively, the residual clause of 924(c)(3)(B) because it has
20 the identical language.

21 THE COURT: Identical language, yes.

22 MS. GALLICCHIO: The Tenth Circuit, as I just said, in
23 *United States v. Salas* has so held. To quote, *Dimaya* compels
24 the conclusion that 924(c)(3)(B) is unconstitutional. And I
25 think the reasoning is very sound. That leaves us with the

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1 elements clause, right? And the elements clause states that a
2 crime of violence means an offense that is a felony that has an
3 element, the use, attempted use, or threatened use of physical
4 force against a person or property of another.

5 So, that leads us to the categorical approach. To
6 determine if an offense is a crime of violence under the
7 elements clause, which I submit is the only clause remaining,
8 the Courts use the categorical approach which has not been
9 abandoned by the Supreme Court or the Second Circuit.

10 So, the government, in their papers do advocate for
11 the survival of the residual clause and suggest that *Dimaya*
12 permits that and permits the application of an underlying
13 conduct approach in the 924(c) context.

14 Your Honor, as we have stated in our papers, that
15 position, that argument is not supported at all by *Dimaya*.
16 There is no doubt that *Dimaya* confirms the residual clause of
17 924(c) is void for vagueness; exact same language, exact same
18 reasoning. The residual clause of 916(b) and 924(c)(3)(B), are
19 identical. There is nothing in *Dimaya* that casts doubt on the
20 well established rule in the Second Circuit that the
21 categorical approach applies to 924(c) in general. And on the
22 contrary, your Honor, with respect to what *Dimaya* holds despite
23 what the government argues, the Court expressly denied the
24 defense request in that case to abandon the categorical
25 approach the same way it did in *Johnson*.

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1 So, your Honor, under the elements clause Counts One,
2 Three and Four clearly are crimes of violence using the
3 categorical approach. With respect to Count One, it seems to
4 me in the papers the government has essentially conceded that
5 point, your Honor, which is why they're advocating for the
6 survival of the residual clause and application of the
7 underlying conduct approach. There is simply, using the
8 categorical approach, your Honor, there is simply not an
9 element, the use, the attempted use, the threatened use of
10 physical force against person or property of another. That
11 offense can be violated by giving money to a terrorist
12 organization, by a doctor treating a soldier in a terrorist
13 organization. So, I think that even the government should
14 agree with our position on that, despite their argument with
15 respect to the residual clause.

16 844(i), your Honor, I want to turn to next, because
17 there is case law that has already held, in the Tenth Circuit,
18 that, post *Dimaya*, 844(i) only qualifies as a crime of violence
19 now under the unconstitutional residual clause. That is
20 because the elements clause requires the use of force to be
21 against the property of another and 844(i) does not,
22 specifically say that.

23 The same argument is true with respect to
24 2332(a)(2)(A) through (D), which is what Mr. Ullah is charged
25 with. Use of a weapon of mass destruction against any person

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1 or property within the United States is the language of that
2 statute. The elements clause requires use of force against the
3 property of another and this statute does not. Significant
4 about that statute, your Honor, is that there are other
5 provisions in 2332(a) that do provide for -- do specifically
6 mention the property owned and leased by the United States or
7 foreign government to specifically address property of another.
8 If you look at (a)(3) and (4).

9 So, I think if you look at the plain reading then of
10 that statute, that statutory language leads only to one
11 conclusion: Had Congress wanted this provision to apply to the
12 property of others only, it would have written it that way
13 since it clearly did it in the other subsections.

14 So, your Honor, we think that it is clear that those
15 counts are no longer crimes of violence, your Honor, and to sum
16 up, the plain text of 924(c) supports our position that it
17 requires separate and distinct crimes of violence which Count
18 Six fails to do. The Supreme Court supports our interpretation
19 of 924(c) and the elements of 924(c). The government's
20 interpretation reads out essentially language of that statute
21 and they have no authority for their interpretation. They
22 focus on double jeopardy, an issue that we do not raise. Your
23 Honor, the plain language of that statute, the Supreme Court
24 ruling on that, canons of construction all support our position
25 that Count Six should be dismissed.

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1 THE COURT: Okay. Anything else?

2 MS. GALLICCHIO: Nothing else.

3 THE COURT: Mr. Turner?

4 MR. TURNER: Thank you, your Honor.

5 THE COURT: Go ahead.

6 MR. TURNER: Your Honor, this argument, this motion is
7 foreclosed by controlling Second Circuit authority; the
8 *Mohammed* case, the *Khalil* case, the *Salameh* case cited in our
9 brief. Those cases have recognized and found that based on the
10 text and the history of Section 924(c), the same conduct can
11 violate both section 924(c) and the underlying crime of
12 violence. And that's based on the well-established principle
13 that each of those cases recognizes that Congress can impose
14 multiple punishments for the same conduct in two different
15 statutes. Judge, really, the only answer that the defendant
16 posits for those cases is that his argument doesn't sound in
17 double jeopardy.

18 Your Honor, it is not surprising that the defendant
19 takes that position because those cases address the very
20 argument and analysis that he has raised in his motion. The
21 defendant cannot avoid that analysis simply by leaving the
22 words "double jeopardy" or "multiplicity" out of his motion
23 papers. Whether this argument is framed in terms of double
24 jeopardy or multiplicity or statutory construction, the
25 question that was addressed in those cases is whether it is

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1 problematic for a defendant to be held responsible under both
2 924(c) and the underlying crime of violence based on the same
3 or similar conduct, and that question has been answered
4 repeatedly. It is not problematic.

5 Your Honor, the *Mohammed* case is instructive. There
6 was a substantive armed car jacking crime of violence
7 underlying the 924(c) charge. Ms. Gallicchio just tried to
8 distinguish these cases based on the fact that they involved
9 conspiracy offenses. *Mohammed* involved a substantive
10 underlying crime of violence and that underlying crime of
11 violence -- armed car jacking -- 18 U.S.C. 2119, included the
12 possession of a firearm. The Second Circuit recognized that it
13 was confronted with the proposition of the government relying
14 on the same conduct to support both the underlying crime of
15 violence and the 924(c) violation. In fact, the Second Circuit
16 went as far as to recognize that, for double jeopardy purposes,
17 under a *Blockburger* analysis, these were the same offense.
18 Section 924(c) was effectively a lesser included offense. So,
19 if the government proved the 924(c) count it would necessarily
20 prove the armed car jacking.

21 The Second Circuit, looking to the text and the
22 history of 924(c), determined that there was no issue and that
23 Congress had spoken and spoken clearly that any crime of
24 violence warrants a separate and consecutive punishment under
25 924(c).

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1 Judge, we will note, as we have in our papers, that
2 multiple cases have involved Section 924(c) violations based on
3 substantive offenses under the very statutes that are charged
4 here including other terrorism cases involving bombings such as
5 the *Rahimi* case in this district, which I will discuss in a
6 moment, but also the *Reid* case in the District of
7 Massachusetts, the *Tsarnaev* case also in the District of
8 Massachusetts.

9 So, your Honor, this is nothing new. Neither the
10 formulation of a 924(c) charge based on an underlying crime of
11 violence predicated on the same or similar conduct and the
12 argument that the defendant is making is also not new and it
13 has been rejected.

14 Judge, the defendant relies heavily on *Rosemond* and
15 *Rodriguez Moreno*. I would like to address those two cases
16 briefly.

17 THE COURT: Okay.

18 MR. TURNER: These are Supreme Court cases that were
19 decided in wholly different contexts. *Rosemond* addressed the
20 requirements for aiding and abetting liability in the 924(c)
21 space, and *Rodriguez Moreno* addressed venue.

22 Both of those decisions did not address and they had
23 no occasion to address the issue that's presented here which is
24 whether it is problematic for a 924(c) count and an underlying
25 crime of violence to be based on the same conduct. Those cases

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1 involved underlying drug offenses. To the extent they involve
2 isolated brief language suggesting that there are two distinct
3 elements to 924(c) that was, first, a natural -- it arose
4 naturally from the fact of those cases which involve drug
5 offenses; and second, it is not a remarkable proposition.
6 Judge, at bottom, the language that 924(c) prescribes two
7 things can be found in any number of cases. That's not a
8 remarkable proposition. The government is required to prove
9 both the underlying crime of violence and the 924(c) violation,
10 nothing in those cases or any other case suggests that the
11 government cannot rely on the same conduct to do so.

12 Judge, I mentioned the *Rahimi* case, I won't belabor
13 it, it is cited in our papers. It decided the exact same issue
14 presented here. Judge Berman recognized that cases such as
15 *Salameh* and *Khalil* foreclose the argument. He also recognized
16 in a footnote in that decision that no matter how the argument
17 is framed, it is properly viewed as sounding in double jeopardy
18 or multiplicity and we submit that there is no reason to reach
19 a different result here.

20 Finally, Judge, I will note on this particular issue
21 given that Ms. Gallicchio focused on it, even if you were to
22 accept, at face value, this argument that there is a separate
23 and distinct acts requirement, which there is not based on the
24 cases I have just mentioned, there are multiple counts in this
25 indictment that do require the government to prove additional

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1 conduct. Your Honor alluded to one of them, Counts Five and
2 Count Three are examples. The government doesn't have to prove
3 just a bombing but a bombing, for example, that attacked a
4 transportation facility or against people and facilities
5 associated with transportation. It's very analogous to the
6 issue the *Mohammed* court confronted. There you had use of a
7 gun, the 924(c) violation, and use of a gun to effect a car
8 jacking. Here we have the use of a bomb, the 924(c) violation,
9 and the use of a bomb to attack a transportation facility or
10 other similar facilities.

11 So, Judge, we submit that based on the controlling
12 Second Circuit case law there is no merit to the double
13 jeopardy argument that's been raised by the defendant. No
14 matter how it's framed, statutory construction, double jeopardy
15 or otherwise, those cases control and the argument has no
16 merit.

17 THE COURT: Well, I do want to ask you about the
18 residual clause because you do argue that *Dimaya* doesn't take
19 that out here, right?

20 MR. TURNER: We do, Judge, and I can turn to that.

21 THE COURT: Yes, you should.

22 Were you finished?

23 MR. TURNER: No, I was not. Just, I was actually
24 going to turn to the *Dimaya* piece of the argument.

25 THE COURT: All right. So go ahead.

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1 MR. TURNER: Judge, for the reasons that are set forth
2 in greater detail in our papers, we submit that post *Dimaya*
3 Count One can still properly be viewed as a crime of violence
4 under the residual clause or what is also known as the risk of
5 force clause in Section 924(c), 924(c)(3)(B).

6 Judge, *Dimaya* did not require -- and if I ever at the
7 outset, Judge, let me just note that the Court need not reach
8 this issue to decide the defendant's motion.

9 THE COURT: Well, I'm going to need to reach this
10 issue if I ever instruct the jury, aren't I?

11 MR. TURNER: Judge, we agree that ultimately this
12 question would be one for the jury charge. However, Judge,
13 there are multiple ways in which the question could be mooted
14 or narrowed or even clarified between now and the time of any
15 trial, including through a ruling in the *Barrett* case, which is
16 pending in the Second Circuit.

17 THE COURT: That's been pending a long time. That was
18 my case, so I know.

19 MR. TURNER: Or potentially through a resolution of
20 the case, your Honor.

21 Judge, with that said, *Dimaya* does not require a
22 categorical approach to be applied to the risk of force clause
23 of Section 924(c). The decision itself, the multiple decisions
24 in the *Dimaya* case --

25 THE COURT: It is the exact same language as the

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1 provision for which it did, right?

2 MR. TURNER: It does have the same or nearly identical
3 language and we are not drawing --

4 THE COURT: Why would the outcome be different?

5 MR. TURNER: We are not drawing distinction based on
6 the text, your Honor.

7 THE COURT: What are you basing the distinction on?

8 MR. TURNER: We are basing the distinction on the
9 context in which 924(c)(3)(B), the risk of force clause,
10 exists, as well as the decisions themselves in *Dimaya*, which
11 trace throughout a thread that a substantial risk standard,
12 such as that set forth in the risk of force clause, operating
13 by itself, is not constitutionally problematic if it is applied
14 to real world conduct. That thread can be traced in the
15 plurality decision, as well as in the Justice Gorsuch's
16 concurring opinion, and of course in the dissent. That
17 principle, combined with the canon of constitutional avoidance,
18 which we submit is powerful here, certainly authorizes and we
19 submit makes it imperative, that Courts look again at the risk
20 of force clause and assess whether it is best interpreted in
21 fact in light of that canon as requiring an underlying conduct
22 approach that looks to the specific facts of the case.

23 I also mention the context of Section 924(c). Many of
24 the factors that have animated the Supreme Court's decisions in
25 applying a categorical approach to the residual clause in the

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1 ACCA context and in the context of Section 16(b) are not
2 present in the context of Section 924(c). This can be traced
3 back to the *Taylor* decision in the Supreme Court running
4 through *Johnson* and *Dimaya*. Two important considerations that
5 animated those decisions are that by applying a categorical
6 approach to the risk of force clause, you avoid practicality
7 concerns and Sixth Amendment concerns that could be raised if
8 you have a sentencing judge, a sentencing court, making factual
9 determinations about a prior conviction potentially years ago
10 that is not before --

11 THE COURT: These are all good arguments to jettison
12 the categorical approach but the Second Circuit says --
13 basically endorsed it, right? In *Hill*? Am I missing
14 something?

15 MR. TURNER: Judge, the Second Circuit's precedent
16 does apply a categorical approach to the risk of force clause.

17 THE COURT: Right.

18 MR. TURNER: I'm sorry?

19 THE COURT: Right. I'm agreeing with you.

20 MR. TURNER: And we are suggesting, Judge, that based
21 on the intervening decision in *Dimaya*, which for the reasons --

22 THE COURT: You think *Dimaya* has overruled *Hill*?

23 MR. TURNER: Not overruled, your Honor, but the
24 reasoning and the decision itself, we submit, has cast
25 substantial doubt on whether the risk of force clause is

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1 properly interpreted as requiring a categorical approach. So,
2 we submit that should the Court wish to reach the issue, the
3 Court could reach the issue but, again, for the moment we also
4 submit that it is something that the Court need not reach in
5 deciding the defendant's motion because it is undisputed that
6 Count Six is predicated on other crimes of violence that the
7 defendant does not dispute qualify as crimes of violence under
8 the force clause, the elements clause, the validity of which is
9 not in question after *Dimaya*.

10 THE COURT: Well, I'm not -- Ms. Gallicchio will be
11 able to respond to that but my point is whether I decide this
12 now or avoid it now, I'm going to still need to deal with this
13 in a couple of months if we go to trial. Right? I mean, I
14 will have to instruct the jury on these things. I am going to
15 have to instruct a jury as to what it is they need to find in
16 order to convict on Count Six. If I agree with you now that at
17 least some of these would justify Count Six, I am still going
18 to have to ultimately instruct the jury as to what they need to
19 find, and what theories you are relying on are going to matter.
20 In the interim, I suppose may be Barrett will get decided and
21 that will provide some guidance. I don't know that it will.
22 We are two and a half months away from trial at this point,
23 right?

24 MS. GALLICCHIO: That's correct.

25 THE COURT: Two months.

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1 MR. TURNER: The Court has set an October 29th trial
2 date.

3 THE COURT: Almost exactly two months away.

4 MR. TURNER: Judge, what we would respectfully submit
5 and propose here is that given that the challenge to Count Six
6 is, in our view, entirely meritless based on the controlling
7 case law, and Count Six is based here on crimes of violence
8 that in their papers the defendant has acknowledged Counts
9 Three and Five qualify as crimes of violence after *Dimaya* under
10 the force clause which is not implicated by *Dimaya*, the only
11 issue that the Court need address for that motion is whether
12 there is any merit to the multiplicity argument that's been
13 raised by the defendant which there is not under the
14 controlling case law. Then, your Honor, we submit that in the
15 time between now and when the Court is instructing the jury and
16 making determinations about how to instruct the jury, those
17 issues, to the extent they are still live, could be briefed in
18 the *in limine* process and, in addition, as your Honor has
19 pointed out, there could be a decision from *Barrett* or other
20 intervening events that crystallize, clarify, or moot, the
21 issues.

22 For example, if the Barrett Court were to issue a
23 decision adopting the government's position, then the
24 underlying crimes of violence could be properly submitted to
25 the jury for a determination as to whether the specific conduct

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1 has them qualify as crimes of violence.

2 THE COURT: Okay. All right.

3 Is there anything else you wanted to cover,
4 Mr. Turner?

5 MR. TURNER: One last point, your Honor, which is the
6 defendant raises in his reply brief for the first time and
7 Ms. Gallicchio has argued today, that two additional of the
8 underlying predicate crimes of violence, Count Four, which is
9 844(i), the destruction of property, and Count Two, the weapons
10 of mass destruction count under 18 U.S.C. 2332(a), do not
11 qualify as crimes of violence even under the force clause.
12 Again, Judge, those issues have not been fully briefed for the
13 Court given that they were raised for the first time in the
14 reply brief.

15 Briefly, Judge, the argument that the weapons of mass
16 destruction count does not qualify as a crime of violence is,
17 frankly, far-fetched. The Second Circuit has held, and this is
18 in the *Hill* decision, that there must be not just a theoretical
19 possibility of the statute being applied to conduct that
20 doesn't qualify as a crime of violence but a realistic
21 probability. There is no such realistic probability with
22 respect to that statute.

23 Again, your Honor, with respect to 844(i), there is
24 case law in the Tenth Circuit finding that it does not qualify
25 as a crime of violence under the force clause. That issue is

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1 open in this Circuit, it has not been fully briefed. We just
2 wanted to point that out for two reasons. First, the Court
3 need not reach either of those two questions because, again,
4 there are undisputed other crimes of violence underlying Count
5 Six so that that motion can properly and, in our view, easily
6 be decided based on Counts Three and Five which are in
7 disputably crimes of violence under the force clause; and
8 second, your Honor, to highlight that to the extent the
9 defendant is raising additional arguments about which of the
10 underlying counts properly qualify as crimes of violence, those
11 issues with respect to 844(i) and 2332(a) have not been fully
12 briefed and could be briefed as part of the *in limine* process
13 that would allow the Court to fully address any 924(c) related
14 issues for purposes of charging the jury, your Honor.

15 THE COURT: Okay. Thank you, Mr. Turner.

16 Ms. Gallicchio?

17 MS. GALLICCHIO: Yes, Judge. Just briefly.

18 Your Honor, I just want to respond briefly with
19 respect to the *Rosemond* case and the *Rodriguez Moreno* case,
20 your Honor. The government, as they said in their papers,
21 suggests that because the *Rodriguez Moreno* case addressed the
22 question of venue which actually was a kidnapping, not a drug
23 offense, a kidnapping offense in a 924(c) event, and *Rosemond*
24 was addressing aiding and abetting in relationship to drug
25 trafficking in a 924(c), that they're not instructive. But, I

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1 think that they should read those cases again much more
2 carefully because while, yes, that's true that was the primary
3 issue that was raised on appeal the Court, in analyzing what it
4 means to aid and abet and the question of venue, they had to
5 analyze, in detail, what the statute involves. And it is given
6 a great deal of coverage in both of those cases, the question
7 about 924(c), and what is required. And, clearly, both of
8 those cases state that 924(c) contained two distinct conduct
9 elements.

10 The government also suggests that because there are
11 other elements in the underlying counts that our argument
12 fails. But, your Honor, those underlying counts, our position
13 is, that those other elements are either intent elements or
14 jurisdictional elements and those underlying crimes, however,
15 the conduct, the essential conduct element is use of a bomb.
16 They cannot be committed without the use of a bomb which is the
17 essential point of our argument, your Honor.

18 And finally, your Honor --

19 THE COURT: That's with respect to all?

20 MS. GALLICCHIO: With respect to Two through Five.

21 THE COURT: Two through Five including Five. Five
22 can't be committed without using the bomb.

23 MS. GALLICCHIO: Yes. That's our position.

24 THE COURT: Okay.

25 MS. GALLICCHIO: Your Honor, and then finally with

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1 respect to the question of crimes of violence, I do think it is
2 important for the Court to make the decisions, make a decision
3 with respect to those three that we have outlined in our papers
4 that we have discussed here in court so that everyone is aware,
5 if this case were to go to trial, what we are facing. And not
6 wait for motions *in limine* or discussions on jury instructions
7 for decisions on these issues.

8 Your Honor, we have pointed out to Counts One through
9 Five. The question of what is a crime of violence we all know
10 is changing every day so we are not making any other arguments
11 at this point. Under the state of the law our argument is with
12 respect to the counts that we have identified.

13 THE COURT: Okay.

14 MS. GALLICCHIO: Thank you.

15 THE COURT: All right. I am going to reserve. This
16 was useful and it is always good to have good lawyers and I
17 want to think about the arguments that have been made, so I'm
18 going to do that but I will rule shortly. In the meantime, we
19 have got a trial scheduled so we should be proceeding with that
20 in mind. That date is not going to change, that's a real date.
21 So, that's the point I wanted to make.

22 Is there anything else we should talk about while we
23 are all here? Mr. Turner?

24 MR. TURNER: Other than potentially scheduling, your
25 Honor, pretrial dates, nothing further on the motions.

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1 THE COURT: Dates for final pretrial conference and
2 submissions?

3 MR. TURNER: That's right, your Honor. At the last
4 conference your Honor indicated that at today's conference you
5 might be inclined to set date for *in limine* briefing.

6 THE COURT: I will do that. I have told you how
7 generally we do that, probably five weeks before is when I
8 expect submissions to be made, government's motions *in limine*,
9 404(b) notice which may not be applicable here, witness list,
10 exhibit list, a week or 10 days later defendant's response, and
11 defendant motions *in limine*. If you know you are putting on a
12 case, I guess unless there is a reason not to, witnesses and
13 exhibits for that, and then give the government an opportunity
14 to respond to those motions *in limine*, etc., and then the final
15 pretrial conference with the last date coinciding with the
16 government's response being the date for joint proposed request
17 to charge and joint proposed voir dire.

18 So, I will issue an order in the next couple of days
19 about that, probably the beginning of next week, but that will
20 be the rough time table. So, deliverables will start being due
21 about five or so weeks before trial. Okay?

22 MR. TURNER: Thank you, Judge.

23 THE COURT: Yes.

24 Ms. Gallicchio, anything else?

25 MS. GALLICCHIO: No. Nothing else, your Honor. Thank

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1 you.

2 THE COURT: Mr. Ullah, I am going to reserve on this
3 motion, we are going to go forward with trial as we previously
4 scheduled. If, for whatever reason, you think you need to see
5 me between now and the trial date, you tell Ms. Gallicchio and
6 we can schedule something, that is not a problem. Okay?

7 THE DEFENDANT: Okay.

8 THE COURT: All right. So, let me thank the marshals.
9 Let me thank the court reporter, of course. Let me thank
10 everybody who is here in attendance. And, I appreciate the
11 lawyers' good efforts. It is helpful to have briefing and
12 quality argument.

13 Have a nice day.

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